Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1998

GREGORY JAMES CATON,

Petitioner,

vs.

KEVIN TRUDEAU,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can a bankruptcy court in a dischargeability hearing employ a state's law of collateral estoppel which does not require that issues be actually litigated contrary to this Court's prior holding in *Brown v. Felsen*, 442 U.S. 132, 99 S. Ct. 2205 (1979)?

Can a bankruptcy court give collateral estoppel effect to a state court judgment when no evidence or findings of fact from the state court proceeding are presented to the bankruptcy court?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is published at 157 F.3d 1026. It is reprinted at appendix A. The opinion on rehearing is attached at Appendix B.

The Fifth Circuit denied plaintiff's petition for rehearing and suggestion for rehearing en banc on November 25, 1998. The opinion is not published but can be found at Appendix C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 26, 1998. On November 3, 1998 the Court of Appeals for the Fifth Circuit entered an opinion on rehearing.

On November 25, 1998 the United States Court of Appeals for the Fifth Circuit denied Gregory James Caton's timely filed petition for rehearing and suggestion for rehearing en banc. Pursuant to Supreme Court Rule 13.1 this petition has been filed within ninety days of the denial of rehearing.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

11 U.S.C. § 523(a)(6) provides "(a) A discharge under Sections 727, 1141, 1228(a), 1228(b) or 1328(b) of this Title

does not discharge an individual debtor from any debt . . .

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity".

11 U.S.C. § 523(c)(1) provides "Except as provided in subsection (a)(3)(B) of this Section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of Subsection (a) of this Section unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be of subsection (a) of this Section".

STATEMENT OF THE CASE

In 1991 appellant, Gregory James Caton authored a book entitled "MLM Fraud. A Practical Handbook for the Network Marketing Professional". One chapter of the book concerned respondent Kevin Mark Trudeau. Appellant, Gregory James Caton also published unflattering but truthful information about Kevin Mark Trudeau on the internet.

On January 26, 1996 Kevin Mark Trudeau filed a complaint for libel and slander in Cook County, Illinois. Kevin Mark Trudeau stated in his state court complaint that the statements made about him were false, libelous, and all lies.

Kevin Mark Trudeau subsequently obtained a ten million dollar ($10,000,000.00) default judgment against

appellant Gregory James Caton. After Gregory James Caton filed for bankruptcy court protection, Kevin Mark Trudeau filed a complaint in bankruptcy court seeking to have the Illinois default judgment declared nondischargeable. In response to the bankruptcy court complaint, Gregory James Caton presented evidence to the bankruptcy court showing that the statements that he made about Kevin Mark Trudeau were all true. Kevin Mark Trudeau presented no evidence to the bankruptcy court other than the petition and judgment from the state court proceeding.

Kevin Trudeau in his libel suit denied having a criminal record and objected to being called a thief. The evidence presented to the bankruptcy court included Trudeau's two felony theft convictions including one for stealing over $128,000.00

The bankruptcy court held that the Illinois State Court default judgment should be given collateral estoppel effect, therefore precluding Gregory James Caton from proving the truth of his statements. The district court and the court of appeals for the fifth circuit affirmed. Gregory James Caton's petitions for rehearing and suggestion for rehearing en banc were denied by the court of appeals.

REASONS FOR GRANTING THE WRIT

1. THE FIFTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH THIS COURT'S PREVIOUS OPINIONS IN *GROGAN V. GARNER* AND *BROWN V. FELSEN* AND IS CONTRARY TO CONGRESS' MANDATE THAT BANKRUPTCY COURT'S DECIDE DISCHARGEABILITY ISSUES.

Prior to 1970, the issue of the dischargeability of debts listed in a bankruptcy was decided by non-bankruptcy courts. In 1970, Congress amended the bankruptcy code to require creditors to apply to the bankruptcy court for adjudication of dischargeability questions. In 1979, this Court held in *Brown v. Felsen,* that res judicata would not be applied in bankruptcy dischargeability complaints and further held that the bankruptcy court was not confined to a review of the record and judgment in the prior State Court proceeding when considering the discharge ability of a debt. *Brown v. Felsen,* 442 U.S. 132, 995 S. Ct. 2205 (1979). This Court did not rule on the issue of collateral estoppel at that time, but it stated in footnote #10 that if in the course of adjudicating a state law question, a state court should determine factual questions using evidentiary standards identical to those used by the bankruptcy court collateral estoppel might apply.

In 1991 this Court decided *Grogan v. Garner,* and held that collateral estoppel applies to bankruptcy dischargeability issues. This Court further held that bankruptcy courts should give collateral estoppel effect to those elements required for discharge which were *actually litigated and determined* (emphasis added) in the prior action. *Grogan v. Garner,* 111 S. Ct. 654, 498 U.S. 279 (1991).

Trudeau's complaint alleged two counts of libel per se. Under Illinois law, by failing to plead, appellant Gregory James Caton admitted by default the factual allegations contained in the complaint. Because the factual allegations were deemed admitted, the Cook County court ruled against Gregory James Caton and in favor of Trudeau without requiring any evidence to prove the allegations of the complaint. No evidence from the State Court proceeding was submitted to the bankruptcy court for review or in support of Trudeau's bankruptcy complaint alleging non-dischargeability of the debt.

The lower courts erred in giving collateral estoppel effect to a state court default judgment that was not actually litigated in state court. Further, the lower courts erred in not applying the Bankruptcy Code's evidentiary requirements to the non-dischargeability complaint filed by Trudeau.

The lower court's holding is contrary to this court's prior holding that collateral estoppel only applies to facts that were actually litigated. This court should grant this writ of certiorari because the lower court's decision conflicts with this court's prior decision and is contrary to law.

This court should also find that the lower courts erred in not permitting Gregory James Caton to present evidence to show the truthfulness of his statements concerning Kevin Trudeau. This court should reaffirm the holding in *Brown v. Felsen,* supra that Congress' mandate of the fullest possible inquiry into dischargeability issues requires bankruptcy courts to consider evidence extrinsic to the judgment and the record of a prior state court suit.

2. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH OPINIONS OF OTHER CIRCUIT COURTS

The Court of Appeals for the Fifth Circuit and other circuit courts have previously held that judgments can only be given collateral estoppel effect when the record contains detailed factual findings that meet the federal test of nondischargeability. *See Matter of Alleman*, 735 F.2d 863 (5th Cir. 1984); *Matter of Poston*, 735 F.2d 866 (5th Cir. 1984); *Matter of Shuler*, 722 F.2d 1253 (5th Cir. 1984); *Matter of Pancake*, 106 F.3rd 1242 (1997); *In re Braen*, 900 F.2d 621 at 630 (CA3 1990); *Combs v. Richardson*, 838 F.2d 112 at 115 (CA 4 1988); *Klingman v. Levinson*, 831 F.2d 1292 at 1295 (CA 7, 1987); *Goss v. Goss*, 722 F.2d 599 at 604 (CA 10, 1983); *Spillman v. Harley*, 656 F.2d 224 at 228 (CA 6 1981).

The rule in most circuits is that the issues important to dischargeability of the debt must have been actually litigated for collateral estoppel to apply. *See In re Kaynor*, 922 F.2d 1146, 1150 (4th Cir. 1991); *In re Gottherner*, 703 F.2d 1136, 1140 (9th Cir. 1983); *In re McMillan*, 759 F.2d 289, 292 (3rd Cir. 1978); *Commonwealth of Massachusetts v. Hale*, 618 F.2d 143, 146 (1st Cir. 1980); *In re Bilzerian*, 153 F.3d 1278 (11th Cir. 1998), *In re Cocrane*, 124 F.3d 978 (8th Cir. 1997).

Several courts have held that default judgments should not be given collateral estoppel effect because the issues decided by default were not actually litigated. *In re Daley*, 744 F.2d 834 (9th Cir. 1985).

There is some authority to the contrary. A number of courts have held that default judgments are given collateral estoppel effect where the defendant actively participated in the litigation. *In re Dailey,* 47 F.3d 365 at 368-369 (9th Cir. 1993), *In re Docteroff,* 133 F.3d 210 at 214 (3rd Cir. 1997).

In the case of *In re Calvert,* 105 F.3d 315 (6th Cir. 1997) the court held that collateral estoppel applies to true default judgments in bankruptcy dischargeability proceedings in those states which would give such judgments that effect. See also *In re Bursack,* 65 F.3d 51 (6th Cir. 1995).

In this case, the Fifth Circuit Court of Appeals indicated that it applied the Illinois law of collateral estoppel. In so doing, the fifth circuit found the settled jurisprudence from Illinois bankruptcy courts holding that default judgments are not given collateral estoppel effect unpersuasive (see footnote seven of the lower court's opinion at Appendix A).

The issue whether federal or state law rules of collateral estoppel should be applied by bankruptcy courts in determining dischargeability issues has never been addressed by this court. This court should grant this writ of certiorari to resolve the unsettled question of whether a state law rule that gives collateral estoppel effect to issues that were not actually litigated is contrary to the Bankruptcy Code's mandate that bankruptcy courts decide dischargeability issues.

In this case, the Court of Appeals for the Fifth Circuit departed from its precedents and held that it no longer needs to be provided with factual findings for it to apply

collateral estoppel. This court should grant writs to resolve the conflict between the circuits whether factual findings from the state court proceedings are necessary for collateral estoppel to be applied in the bankruptcy dischargeability hearings.

In addition, the Fifth Circuit's decision in this case holding that collateral estoppel applies when a party had an opportunity to litigate but failed to do so, is in direct conflict with the decisions of other circuit courts of appeals on the same issue. Other courts of appeals have held that collateral estoppel principles only bar relitigation of facts actually litigated. Here, the fifth circuit holds that collateral estoppel principles bar the debtor from presenting evidence or litigating facts in the underlying state court proceeding which had never been actually litigated. This is contrary to the Bankruptcy Code, this Court's prior holding in *Brown v. Felsen*, supra, and the holdings of the other Circuit Courts of Appeals.

The judgment of the Court of Appeals for the Fifth Circuit should be reversed and vacated and this matter remanded for decision consistent with the law and the prior holdings of this Court.

CONCLUSION

This case presents questions of exceptional importance concerning the duty of bankruptcy courts to conduct a full inquiry into the dischargeability of debts. This court should grant writs to resolve the conflict between the circuits whether collateral estoppel can be applied in circumstances where the factual allegations of the case

were not actually litigated in the state court proceedings and a judgment by default was rendered, but the defendant had the opportunity to litigate. This court should also decide whether collateral estoppel principles can be applied to prevent a bankruptcy court defendant from presenting evidence extrinsic to the state court record but relevant to the issue of dischargeability of the debt.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30205
Summary Calendar

In the Matter of:
GREGORY JAMES CATON,

Debtor.

GREGORY JAMES CATON,

Appellant,

versus

KEVIN TRUDEAU,

Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

(Filed Oct. 26, 1998)

Before POLITZ, Chief Judge, and STEWART and PARKER, Circuit Judges.

POLITZ, Chief Judge:

Gregory James Caton appeals the district court's affirmance of the bankruptcy court's application of collateral estoppel to an Illinois state court default judgment in its determination that said judgment was nondischargeable under 11 U.S.C. § 523(a)(6). For the reasons assigned, we affirm.

BACKGROUND

In January 1996, Kevin Trudeau filed a libel suit against Caton in Illinois state court based on statements Caton made in a book and on an Internet website. Caton removed the action to federal court, but on Trudeau's motion, the action was remanded. Thereafter, Caton failed to respond to Trudeau's claims and the court entered a default and noticed an evidentiary hearing. On June 5, 1996, after a hearing, the court rendered a default judgment against Caton, awarding Trudeau $5 million in compensatory damages and $5 million in punitive damages.

In November 1996, Caton filed for relief under Chapter 7 of the Bankruptcy Code. Trudeau filed a complaint therein, seeking to have the Illinois default judgment declared nondischargeable under section 523(a)(6). Trudeau then moved for summary judgment, contending that the Illinois judgment for libel *per se* established a nondischargeable debt for willful and malicious injury under section 523(a)(6) and further contending that collateral estoppel applied to prevent relitigation of this issue. Caton responded that collateral estoppel did not apply and that the claims supporting the Illinois judgment should be litigated in the bankruptcy court. The bankruptcy court applied collateral estoppel, determined that the Illinois judgment was nondischargeable under section 523(a)(6), and granted Trudeau's summary judgment motion. The district court affirmed; Caton timely appealed.

ANALYSIS

Collateral estoppel applies in bankruptcy dischargeability proceedings, but the bankruptcy court retains exclusive jurisdiction to determine whether a debt is dischargeable.[1] A bankruptcy court's decision to give preclusive effect to a state court judgment is a question of law that we review *de novo*.[2] Because the judgment in question was entered by an Illinois state court, we apply Illinois rules of preclusion.[3]

Under Illinois law collateral estoppel applies when: (1) the issue decided in the prior adjudication is identical with the one presented in the pending suit; (2) the party against whom collateral estoppel is asserted was a party or in privity with a party therein; (3) there was a final judgment on the merits; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit.[4] The existence of these elements is not disputed. Rather, Caton contends that collateral estoppel does not apply to default judgments and that the state court record presented fails to provide a sufficient basis to support reliance on the judgment.

The Illinois Supreme Court has not yet determined whether default judgments are entitled to the same preclusive effect under the doctrine of collateral estoppel as any other judgment, but it has noted that there is a split

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[1] **Grogan v. Garner,** 498 U.S. 279 (1991).

[2] **In re Schwager,** 121 F.3d 177 (5th Cir.1997).

[3] **In re Pancake,** 106 F.3d 1242 (5th Cir.1997).

[4] **Talarico v. Dunlap,** 685 N.E.2d 325 (Ill. 1997).

of authority on the issue with some courts giving default judgments limited preclusive effect.[5] The Appellate Court of Illinois, however, recently has held that collateral estoppel may be applied to a default judgment provided no injustice results from the application.[6] This very recent pronouncement by an Illinois appellate court forecloses Caton's contention, and we thus must conclude that the doctrine of collateral estoppel may be applied to default judgments under Illinois law.[7]

For collateral estoppel to apply, a party must have had a full and fair opportunity to litigate the issue in the prior action and there must be no undue unfairness to the party estopped.[8] Caton clearly had a full and fair opportunity to contest the issue in the state proceeding, and we find no injustice in applying the doctrine of collateral estoppel in this case. Caton was properly notified of the

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[5] **Housing Authority for La Salle County v. YMCA of Ottawa,** 461 N.E.2d 959 (Ill. 1984). **See also In re Asbury, 195 B.R. 412 (Bankr.E.D.Mo.1996) (setting forth split of authority on issue when analyzing Illinois law).**

[6] **Paternity of Rogers,** No. 97-353, 1998 WL 381587 (Ill. App. Ct. July 9, 1998). **See also Grisanzio v. Bilka,** 511 N.E.2d 762 (Ill. App. Ct. 1987).

[7] We note that the majority of the cases relied on by Caton apply federal rules of collateral estoppel and, thus, are distinguishable. To any extent otherwise, we find the cases unpersuasive, especially given the recent determination of this issue by an Illinois state court. **See In re Dempster,** 182 B.R. 790 (Bankr. N.D. Ill. 1995); **In re Dvorak,** 118 B.R. 619 (Bankr. N.D. Ill. 1990); **In re Martinez,** 110 B.R. 353 (Bankr. N.D. Ill. 1990); **In re Leigh,** 165 B.R. 203 (Bankr. N.D. Ill. 1993); **In re Cunningham,** 59 B.R. 743 (Bankr. N.D. Ill. 1986).

[8] **Rogers,** 1998 WL 381587; **Talarico,** 685 N.E.2d 325.

proceeding and, in fact, filed a notice of removal therein. After remand, however, Caton chose not to appear in the proceeding further, even though Trudeau sought actual and punitive damages in excess of $10 million for libel per se. Under these circumstances, it cannot be disputed that Caton had an opportunity to litigate. Caton does not contest that he received notice of the default, as well as the subsequent evidentiary hearing, and he provides no explanation for his failure to pursue his legal remedies after the remand.

Caton further contends that the bankruptcy court cannot rely on the Illinois default judgment because the state record presented is insufficient to support the judgment. He asserts that the facts supporting the judgment are not discernible from the record presented and, thus, dischargeability cannot be determined therefrom. In reviewing the application of collateral estoppel under Texas law, we have articulated the standard upon which Caton relies; that the record reflect the finding made and the supporting facts so that the bankruptcy court may determine that the pertinent issue was litigated and decided.[9] We have never required, however, that a full state court record be presented.[10] We only require that the record introduced have sufficient detail to allow the use

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[9] **Pancake,** 106 F.3d 1242; **In re King,** 103 F.3d 17 (5th Cir. 1997); **In re Poston,** 735 F.2d 866 (5th Cir. 1984); **In re Allman,** 735 F.2d 863 (5th Cir. 1984); **In re Shuler,** 722 F.2d 1253 (5th Cir. 1984).

[10] **King,** 103 F.3d 17; **In re Davis,** 3 F.3d 113 (5th Cir. 1993).

of collateral estoppel.[11] Such has been established in the case at bar.

The state record before us contains Trudeau's complaint wherein he alleges two counts of libel *per se*. The complaint details the particular words alleged to be libelous and incorporates by reference the attached publications in question. Trudeau also alleges in the complaint that (1) "the statements are false"; (2) the statements "were made maliciously and intentionally with full knowledge of their falsity or in complete and reckless disregard of their truth or falsity, for the purpose of injuring and destroying Trudeau's personal and professional reputation"; (3) the statements "impute the commission of a criminal offense to Trudeau, impute the inability to perform or want of integrity in the discharge of Trudeau's duties of employment and prejudice Trudeau in his business and occupation"; and (4) Caton "acted with actual malice." Such factual allegations are sufficient to support a cause of action for libel per se under Illinois law.[12]

Under Illinois law, by failing to plead Caton admits by default the factual allegations contained in the complaint.[13] The default judgment must rest upon the allegations of the petition.[14] Thus, because the factual

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[11] **Id.**

[12] **See Geick v. Kay,** 603 N.E.2d 121 (Ill. App. Ct. 1992).

[13] **People v. $1,124,905 U.S. Currency and One 1988 Chevrolet Astro Van,** 685 N.E.2d 1370 (Ill. 1997).

[14] **See Richards v. Davis,** 185 N.E. 586 (Ill. 1933).

allegations are deemed admitted and the default judgment necessarily rests thereon, we are able to determine conclusively the issue decided by the court when rendering the default judgment. The judgment provides that after hearing the case on "prove-up" at which Trudeau testified, Trudeau is awarded $5 million in compensatory damages and $5 million in punitive damages.[15] Libel being the only cause at issue, and punitive damages requiring allegations of outrageous conduct or acts perpetrated by evil motive or with reckless indifference to the rights of others,[16] the state court necessarily determined these issues by rendering the judgment. No additional record support is required under Illinois law.

Having determined that collateral estoppel applies under Illinois law, we turn to the dischargeability inquiry. Section 523(a)(6) provides that a debt for "willful and malicious injury" by the debtor is nondischargeable.[17] Previously, we defined "willful and malicious" to mean "without just cause or excuse."[18] "Willful means intentional and malicious adds the absence of just cause or excuse."[19] There can be no question, and Caton does not dispute, that a judgment for libel under Illinois law, and a corresponding award of punitive damages, encompasses intentional conduct undertaken without just cause or

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[15] It is worth noting that this is a sum less than the amount Trudeau sought in his complaint.

[16] **See Guice v. Sentinel Technologies, Inc.**, 689 N.E.2d 355 (Ill. App. Ct. 1997).

[17] 11 U.S.C. § 523(a)(6).

[18] **In re Garner**, 56 F.3d 677 (5th Cir. 1995).

[19] **Id.** at 681.

excuse, precluding discharge under section 523(a)(6). Accordingly, we find no error in th edetermination by the courts *à quo* that the Illinois default judgment had collateral estoppel effect as to section 523(a)(6) dischargeability.

The judgment appealed is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30205
Summary Calendar

In the Matter of: GREGORY JAMES CATON,

Debtor.

GREGORY JAMES CATON,

Appellant,

versus

KEVIN TRUDEAU,

Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

(Filed Nov. 3, 1998)

Opinion on Rehearing

(Opinion October 26, 1998, 5th Cir., ___ F.3d ___.)

Before POLITZ, Chief Judge, STEWART and PARKER, Circuit Judges.

POLITZ, Chief Judge:

The following is substituted for the penultimate paragraph in the original opinion (Headnote 8). Otherwise the original opinion is reaffirmed.

Having determined that collateral estoppel applies under Illinois law, we turn to the dischargeability inquiry. Section 523(a)(6) provides that a debt for "willful and

malicious injury" by the debtor is nondischargeable.[17] Previously, we defined "willful and malicious" to mean "without just cause or excuse."[18] Recently, however, this definition was displaced by the Supreme Court's opinion in **Kawaauhau v. Geiger**.[19] In an intervening decision, **In re Miller**,[20] a panel of our court recently held that "an injury is 'willful and malicious' where there is either an objective substantial certainty of harm or a subjective motive to cause harm."[21]

Applying our precedential **Miller** standard to the instant case, we find that there was a deliberate or intentional injury, precluding discharge under section 523(a)(6), as Caton's libelous statements were objectively substantially certain to result in the injury to Trudeau. Accordingly, we find no error in the determination by the courts *à quo* that the Illinois default judgment had collateral estoppel effect as to section 523(a)(6) dischargeability.

The judgment appealed is AFFIRMED.

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[17] 11 U.S.C. § 523(a)(6).

[18] **In re Garner,** 56 F.3d 677 (5th Cir. 1995).

[19] 118 S.Ct. 974, 977 (1998) (stating that "[t]he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury") (emphasis in original).

[20] No. 97-50842, 1998 WL 654811 (5th Cir. Sept. 24, 1998).

[21] **Id.**, slip op. at 90.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30205

In The Matter Of: GREGORY JAMES CATON
Debtor

GREGORY JAMES CATON
Appellant

v.

KEVIN TRUDEAU
Appellee

Appeal from the United States District Court for the Western District of Louisiana, Lake Charles

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(Filed Nov. 25, 1998)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 10/26/98, 5 Cir., ___, ___ F.3d ___)

Before POLITZ, Chief Judge, STEWART and PARKER, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor. (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge